

RECORD OF PROCEEDINGS
PHYSICAL DISABILITY BOARD OF REVIEW

NAME:
CASE NUMBER: PD1200347
BOARD DATE: 20130102

BRANCH OF SERVICE: NAVY
SEPARATION DATE: 20060501

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty PH3/E-4 (Photographer's Mate) medically separated for fibromyalgia. She was treated, but did not improve adequately to fully perform her military duties or meet physical fitness standards. She underwent a Medical Evaluation Board (MEB). The MEB found her fibromyalgia condition medically unacceptable, and referred her to a Physical Evaluation Board (PEB). No other conditions were submitted by the MEB for adjudication. The PEB found the fibromyalgia condition unfitting, and rated it 10%. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: "I believe there is a large discrepancy between the disability rating (0%) given by the Navy when I was discharged and the disability rating given by the VA (50%). I developed symptoms and was diagnosed with Fibromyalgia while I was in the Navy. I also developed and was diagnosed with other chronic conditions while I was in the Navy. These diagnosed conditions are listed in item 14 and in my VA determination letter. The Navy did not take into consideration the effects that time in the Navy had on the whole person. The VA did take into consideration all of my diagnosed conditions and the VA saw it fit to award me with a disability rating of 50% for all of my chronic conditions. Although I had planned to have a full career in the Navy, I was required to leave the Navy because of my disability. I suffer from a number of symptoms because of my diagnosed conditions. To name a few, I suffer from joint and muscle pain, IBS, memory and concentration problems, dysthymia, and difficulty sleeping; become easily fatigued, get almost daily debilitating headaches, am limited in the type of work I can do, and continue to take daily medication to help manage the chronic pain I suffer from. The combination of all of the chronic conditions that I developed while in the Navy have and will continue to negatively impact my daily life."

SCOPE OF REVIEW: The Board's scope of review as defined in DoDI 6040.44, is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) "identified but not determined to be unfitting by the PEB." The unfitting fibromyalgia condition meets the criteria prescribed in DoDI 6040.44, and is accordingly addressed below. The other conditions noted in the CI's written statement to the PDBR are not within the Board's purview. Any condition outside the Board's defined scope of review may be eligible for future consideration by the Board for Correction of Naval Records.

RATING COMPARISON:

Navy PEB – dated 20060207			VA (1 mo. Pre-Separation) – All Effective 20060502			
Condition	Code	Rating	Condition	Code	Rating	Exam
Fibromyalgia	5025	10%	Fibromyalgia	5025	NSC	20060329
No Additional MEB/PEB Entries			Lumbar Strain	5237	20%	20060329
			Right Knee Pain	5260-5003	10%	20060329
			Left Knee Pain	5260-5003	10%	20060329
			Right Wrist Pain	5024	10%	20060329
			Tinnitus	6260	10%	20060329
			0% x 1 / Not Service Connected x 8			20060329
	Combined: 10%			Combined: 50%		

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertion that the Navy PEB did not take into consideration the effects that her time in the Navy had on her whole person. For the record, the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted Service improprieties in the disposition of a case. In addition, the Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. The DES has neither the role nor the authority to compensate members for future severity or potential complications of conditions. That role and authority is granted to the Department of Veterans Affairs (DVA). The Board evaluates DVA evidence in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness and rating determinations at the time of separation. While the DES considers all of the CI's medical conditions, compensation can only be offered for those conditions that cut short a member’s career, and then only to the degree of severity present at the time of separation. The DVA, however, is empowered to compensate for service connected conditions and to periodically re-evaluate conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment change.

Fibromyalgia. The CI was evaluated in November 2004 for multiple joint pains. The pain was mostly in her knees, ankles, and right hip. She was also having frequent headaches. Her joint pain was initially diagnosed as chronic overuse syndrome. In April 2005, she was re-evaluated by Rheumatology and was found to have 12 out of 18 fibromyalgia tender points and no evidence of inflammatory arthritis. Her symptoms included: back pain, elbow pain, right hip pain, wrist pain, ankle pain, knee pain, fatigue, headaches, diarrhea, and constipation. She was diagnosed with fibromyalgia at that time. Because of her pregnancy, treatment options were limited. Her fibromyalgia symptoms did not improve significantly, and she was unable to fully perform her military duties or meet physical fitness standards. As noted above, she underwent MEB/PEB and was medically separated from the Navy with a disability rating of 10%. In March 2006, she had a VA Compensation and Pension (C&P) exam. At that exam, she was found to be tender all over her body. The fibromyalgia was described as active, but she was not diagnosed with fibromyalgia because there was “no pathology to render a diagnosis.”

The Board carefully reviewed all evidentiary information available. In the VA Schedule for Rating Disabilities (VASRD) §4.71a, fibromyalgia is described as widespread musculoskeletal pain and tender points with or without fatigue, sleep disturbance, stiffness, paresthesias, headache, irritable bowel symptoms, depression, anxiety, or Raynaud’s-like symptoms. The rating is based on the frequency of symptoms. A 20% rating applies when the symptoms are episodic; with exacerbations present more than 1/3 of the time. A 40% rating applies when symptoms are constant (or nearly so), and refractory to treatment. The March 2006 C&P exam was done 33 days prior to separation. At that exam, the CI’s symptoms were described as

constant, as well as episodic. She reported widespread musculoskeletal pain, fatigue, headaches, sleep disturbance, stiffness, anxiety, and depression. The symptoms were present more than 2/3 of the time. Her functional impairment was described as: can't tolerate stress or activities, completely exhausted all the time, and pain limits activities. The examiner opined, "Tenderness throughout the back and at all joints is not considered significant in this claimant, particularly the ankles and hips where no additional objective findings are noted."

The most critical component of the Board's deliberation to reach a fair and accurate recommendation in this case, is to determine whether the CI's fibromyalgia symptoms were "constant, or nearly so, and refractory to therapy" /or/ "episodic, with exacerbations often precipitated by environmental or emotional stress or by overexertion, but that are present more than one-third of the time." The only clinical evidence of the frequency or constancy of symptoms near the time of separation, comes from the March 2006 C&P exam. The Board noted certain inconsistencies in that exam which cast some doubt on its validity and probative value. However, the Board found insufficient evidence in the treatment record to refute the reported constant nature of the CI's pain symptoms. After due deliberation, considering all of the evidence, and mindful of VASRD §4.3 (Reasonable doubt), the Board recommends by majority decision (2:1 vote) a separation rating of 40% for the fibromyalgia condition.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the fibromyalgia condition, the Board recommends by majority decision (2:1 vote) a disability rating of 40% IAW VASRD §4.3 and §4.71a. The single voter for dissent (who recommended a 20% rating) prepared the appended minority opinion. There were no other conditions within the Board's scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI's prior determination be modified as follows; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of her prior medical separation.

UNFITTING CONDITION	VASRD CODE	RATING
Fibromyalgia	5025	40%
	COMBINED	40%

The following documentary evidence was considered:

- Exhibit A. DD Form 294, dated 20120411, w/atchs.
- Exhibit B. Service Treatment Record.
- Exhibit C. Department of Veterans' Affairs Treatment Record.

President
Physical Disability Board of Review

MINORITY OPINION

The majority vote in this case conceded a 40% rating for the CI's fibromyalgia condition largely on the basis of the CI's C&P exam in March of 2006, approximately a month prior to her separation. I believe the CI's condition at separation more closely approximated a 20% disability under the disability code for fibromyalgia.

I respectfully point out that the C&P exam of 29 March 2006 has numerous findings (and some inconsistencies), which in my opinion, do not support the 40% disability rating criteria for fibromyalgia, in accordance with 38 USC Part IV. The general criteria for fibromyalgia, according to 38 USC Part IV requires "widespread musculoskeletal pain and tender points, with or without associated fatigue, sleep disturbance, stiffness, paresthesias, headache, irritable bowel symptoms, depression, anxiety, or Raynaud's-like-symptoms." The 40% level for this condition further requires symptoms to be: "constant or nearly so and refractory to therapy." The VA examiner annotates in each of the CI's separate musculoskeletal assessments that her "pain occurs constantly," yet the same specific history as recorded shows that the CI's pain for that particular joint/body part is "relieved" by rest and therapeutic measures. The history as recorded also shows that the CI's pain is not (with emphasis) refractory to therapy. As quoted particularly from the history of the CI's knees (which were among the most prominent of her painful joints): "It (the pain) is relieved by rest and the medication, Indocin. At the time of pain she can function with medication."

According to 38 USC Part IV, the 20% level for this condition requires symptoms: "that are episodic, with exacerbations often precipitated by environmental or emotional stress or by overexertion, but that are present more than one-third of the time." The VA examiner in the aforementioned exam (particularly for fibromyalgia) said: "The claimant has been suffering from Fibromyalgia. The condition has existed since 2002. The location of the condition is throughout the whole body. The claimant has easy fatigability, headaches, sleep disturbance, stiffness, anxiety, depression and occasional spasms in arms and legs. The above noted symptoms occur constantly, which means more than 2/3 of the time per year. **The symptoms are precipitated by the environmental stress of a drastic change in temperature**" (with emphasis). Logic would dictate that for the symptoms to be constant and to be precipitated by "the environmental stress of a drastic change in temperature," such changes would need to be nearly constant to support this cause and effect. The VA examiner then makes the same point as above with respect to the condition not being refractory to therapy: "The claimant has been treated with Indocin from 2004 to 2005 and there has been a favorable response to the treatment (with emphasis). The claimant has been treated with Vioxx from 2003 to 2004 and there has been a favorable response to the treatment (with emphasis)...She still requires continuous treatment to control this condition (with emphasis) because condition has not gone away, but can't take medications now while breastfeeding..."

Further complicating assessing the evidence in this case is that the CI was pregnant from the time shortly prior to the definitive Rheumatology exam (in April of 2005 – which showed she had 12 of 18 tender points) through the end of November 2005. During this time, the CI was unable to follow prior therapeutic regimens (specifically, she stopped any medication which she previously had used to treat her condition). Furthermore, she did not take medication post-delivery as she was breastfeeding throughout this time (this was documented at the March 2006 VA exam per above).

The Board unanimously designated what it felt was the proper rating code in this case (5025: fibromyalgia). As the Board examined the rating comparison at the time of separation, it was evident the VA did not service-connect the fibromyalgia as the VA examiner (from the aforementioned exam) stated there was "no pathology to render a diagnosis." The VA rater

was forced to rate the CI based on the individual disabling condition of each joint the CI claimed. There is no doubt that before the CI became pregnant, she had profiles which limited her ability to run and thereby fulfill the obligations of her office, grade, rank or rating. However, in my opinion, if one takes the separately rated conditions (by the VA) and superimposes these onto the fibromyalgia which the CI's service conceded, the degree of the widespread pain and associated limits placed upon the CI's functionality while in service, particularly with respect to conditions of the upper body quadrants, would not warrant a combined disability above 20%.

In my opinion, the VA exam's presentation of evidence during the compensation and pension exam, along with the obvious limits to the CI's therapeutic management of her condition due to her pregnancy (and the evidence that the condition was managed with such medication/therapy – to a degree – prior to her pregnancy) overcomes reasonable doubt in the CI's favor, and leads me to a fair and equitable recommendation in this case of 20% for the CI's fibromyalgia condition.

MEMORANDUM FOR COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION
ICO XXXXXXXXX, FORMER USN, XXX-XX-4336

Ref: (a) DoDI 6040.44
(b) PDBR ltr dtd 8 Jan 13

I have reviewed subject case pursuant to reference (a) and non-concur with the majority recommendation of the Physical Disability Board of Review as set forth in reference (b). I do, however, concur with the minority voting member, for the reasons cited in his opinion, that Ms. XXXXXX condition warranted a 20 percent disability rating at the time of her separation. Therefore, Ms. XXXXXX naval records will be corrected to reflect an increase in disability rating from 10 percent to 20 percent effective the date of her discharge.

Principal Deputy
Assistant Secretary of the Navy
(Manpower & Reserve Affairs)